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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 595

ALEXANDER P. TUREAUD, JR., a Minor, by Alexander P. Tureaud, Sr., his father and next friend,

Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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May It Please the Court:

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the District Court (R. 21-30) are reported in 116 F. Supp. 284. The opinion of the Court of Appeals (R. 35-45) is reported in 207 F.2d 807.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1251 (1).

QUESTION PRESENTED

The sole question presented to this Court is whether or not the decision of the Court of Appeals for the Fifth Circuit holding that petitioner's application for injunctive relief should have been heard and determined by a three judge court pursuant to Title 28, United States Code, Section 2281 et seq., is correct.

CONSTITUTIONAL PROVISION INVOLVED

Article XII, Section 1 of the Constitution of Louisiana, 1921, is involved. No statute is implicated.

STATEMENT OF THE CASE

Petitioner, a resident of Louisiana, brought this action on his own behalf and on behalf of all other Negro citizens of the United States, residing in the State of Louisiana, for a declaratory judgment permitting him and others similarly situated to enter the Louisiana State University and Agricultural and Mechanical College (hereinafter sometimes referred to as "Louisiana State University"), a school reserved for white persons only. (R. 1-12.)

Jurisdiction was invoked under the Civil Rights Acts of the United States and under Title 28 of the United States Code, Section 2281. (R. 1-2.)

Petitioner averred that he sought entrance into the Junior Division of the College of Arts and Sciences at Louisiana State University in order to pursue a combined curriculum leading to the Bachelor of Arts Degree and the Bachelor of Laws Degree. He stated that on or about June 5, 1953, he applied for admission to Louisiana State University as a freshman desiring to pursue the combined liberal arts curricu-

lum in said College of Arts and Sciences and law course in the Law School, that he furnished a transcript of his high school credits and filled out the customary application blanks. He averred that at the time of the application, he possessed all the scholastic, moral and other lawful qualifications prescribed by the laws of the State of Louisiana, that he was willing and able to pay all lawful fees and charges, and would conform to all lawful, uniform laws and regulations of the University. (R. 5-6.) He further alleged that the combined courses could be completed by him in the Louisiana State University in six years, and "There is no other institution or school maintained by the State of Louisiana at which plaintiff can obtain the advantages involved in the combination courses here offered nor combine his college and law school work to the same extent and on equal level of scholarship and intensity as in schools of the Louisiana State University." (R. 5-6.)

He alleged further that defendants have pursued and are pursuing a policy of excluding Negroes from all colleges and undergraduate departments of Louisiana State University pursuant to the Constitution and laws of the State of Louisiana, because of their race or color, and that their action in denying plaintiff and other Negroes similarly situated admission to the Junior Division of the Louisiana State University because of their race or color is a violation of the plaintiff's and other Negroes' privileges and immunities as citizens of the United States, and a deprivation of their liberty and property without due process of law, and the equal protection of the laws, secured by *Section 1 of the Fourteenth Amendment of the Constitution of the United States*, and rights secured by the *Civil Rights Acts, Section 41 of Title 8 of the United States Code.* (R. 6-7.)

He prayed that a three-judge court be convened immediately as required by Title 28, United States Code, Section 2284 (R. 8) and for a preliminary injunction restraining defendants from enforcing or executing against plaintiff and other Negroes similarly situated, *the order* of the defendant Board of Supervisors excluding Negroes from the University as provided in the Constitution and laws of the State of Louisiana, and that after due hearing a permanent injunction be issued.

The defendants first moved to dismiss the action on the grounds: (1) because the plaintiff, a minor, is incompetent to institute or maintain the action or to stand in judgment herein as shown by the allegations of the complaint, (2) because the complaint fails to state a claim upon which relief can be granted upon class action since the alleged right sought to be enforced is a personal one and can only be enforced if the plaintiff has a personal and present right, and the court should not grant any injunctive relief whatsoever with respect to unnamed parties whose qualifications and eligibility for admission to Louisiana State University depends upon the judgment and decision of the University's representatives in evaluating the qualifications of the applicant in any individual case. In the alternative, defendants' motion avers that the plaintiff can assert no interest on behalf of others in other colleges, departments or divisions of the University.

Reserving all rights under the motion to dismiss, the defendants answered the application for preliminary injunction, and denied generally all of the allegations therein contained. Defendants especially denied the averment of the complaint that there is no other institution maintained by Louisiana at which plaintiff could obtain the advantages involved in the combined curriculum of fine arts and law as in the schools of

Louisiana State University, and obtain the degrees of Bachelor of Arts and Bachelor of Laws in six years. Defendants averred that plaintiff could pursue such a combined curriculum and obtain these two degrees at Southern University, located five miles north of Baton Rouge, and that at Southern University, which is reserved for Negroes exclusively, plaintiff can obtain equal or substantially equal advantages and opportunities in pursuing the courses and obtaining the education which he desires.

Defendants admitted that plaintiff applied for admission to the Louisiana State University and furnished a transcript of his credits, and admitted that the laws of the State of Louisiana set forth in paragraphs 7-8 of the complaint justified the defendants' action in rejecting the plaintiff's application, but defendants averred that there are reasons for rejecting such application other than the reason that the plaintiff is a Negro.

Defendants denied that their action denied or will deny plaintiff and other Negroes of any right secured to them by the Constitution and laws of the United States, and denied that any irreparable injury will result from the actions of the defendants.

Defendants averred that the Constitution and laws of the State of Louisiana require segregation of the white and Negro races, and that the state and its agencies are acting pursuant to their police power in excluding Negroes from schools reserved for whites and vice versa; that Louisiana has spent and presently is spending many millions of dollars in the establishment of separate schools and colleges for the two races; that such expenditures are being made for the purpose of providing equal facilities and opportunities for all citizens

of the state regardless of race and color. Defendants stated that the policy of the State of Louisiana in this regard is based upon interpretations given by the courts and Congress to the *Thirteenth and Fourteenth Amendments of the Constitution of the United States*, and any changes made in such interpretations at this time and any interference in the exercise of the police power of the state in this respect would destroy the value of Louisiana's investment in education, disrupt its school system and result only in confusion and inefficiency in its educational system.

Although the complaint prayed for the appointment of a three-judge court to hear and determine plaintiff's application for injunctive relief, the District Judge failed and refused to summon the statutory court and proceeded to hear the application for preliminary injunction upon the pleadings and affidavits. After such hearing, judgment was granted in favor of plaintiff and a temporary injunction was issued enjoining and restraining the defendants pending the final determination of this action in carrying out the orders of the Board of Supervisors of the Louisiana State University complained of, and enjoining the defendants from refusing because of race and color to admit the plaintiff and any other Negro of the state similarly situated and qualified to the Junior Division of the Louisiana State University for the purpose of pursuing the combined arts and sciences and law courses offered by the Louisiana State University.

Defendants moved for a new trial, urging, among other things, that jurisdiction of the subject matter was vested in a three-judge court as provided by law, particularly by *28 U. S. Code, Sections 2281 and 2284*. The motion was overruled, and defendants then applied to the Court of Appeals for the Fifth

Circuit for a stay order, and appealed from the judgment issuing a preliminary injunction. All defenses urged in the District Court were renewed in the Appellate Court, and the case was argued on its merits on the application for a preliminary injunction. However, the Court of Appeals, speaking through Chief Judge Hutcheson, held that the District Judge was without jurisdiction to hear and determine the application for injunction, that the matter should have been heard and determined by a three-judge court, and hence, the order of the District Judge was vacated and the cause was remanded to the District Judge with directions to take further proceedings not inconsistent with the Court's opinion. (R. 35-41.) Judge Rives dissented, assigning written reasons. (R. 41-45.)

Plaintiff did not apply for a rehearing, but instead applied to this Court for a stay order, which was granted, and then filed his petition for certiorari.

ARGUMENT

Plaintiff invoked the jurisdiction of the District Court under Title 28, United States Code, Sections 1331, 1343 and 2281. (Amended complaint, R. 1-2.) In sub-paragraph (c) of paragraph 1 of the amended complaint (R. 2) he alleged as follows:

> "The jurisdiction of this Court is also invoked under Title 28, United States Code, section 2281. This is an action for an interlocutory injunction and a permanent injunction restraining the action of *officers* of the State of Louisiana in the enforcement of *statutes* of the State of Louisiana and the execution of and the enforcement of an *order* made by defendant Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, acting as an administrative board or com-

> mission under statutes of such State, as hereinafter more fully appears." (Emphasis supplied.)

In paragraph 7 of the amended complaint (R. 5) he alleges:

> "Article XII, Section 1, of the Constitution of Louisiana, 1921, provides as follows:
>
> " 'Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years.' "

Plaintiff stated in paragraph 8 of his amended complaint (R. 5):

> "The Louisiana State University and Agricultural and Mechanical College was established in the year 1876. Throughout the existence of the Louisiana State University and Agricultural and Mechanical College, defendant, the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, has maintained and pursued the uniform policy of restricting admission to the undergraduate department of said institution to white students. *Defendant, Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, acting as an administrative board or commission of the State of Louisiana under statutes of said State, has made and established an order excluding, because of their race or color, plaintiff and all other Negroes otherwise qualified, residing in the State of Louisiana*, from all colleges, and undergraduate divisions of the Louisiana State University and Agricultural and Mechanical College." (Emphasis supplied.)

Further reference to the alleged order of respondent Board of Supervisors of Louisiana State University and Agricultural and Mechanical College is made in paragraph 13 of the amended complaint (R. 7), which reads as follows:

"Plaintiff is informed and believes, and therefore alleges upon information and belief, that but for the laws of the State of Louisiana set forth in paragraph 7 hereof, defendants would not have established and would not be enforcing or executing *the order* set forth in paragraph 8 hereof, and would not have pursued and would not be pursuing the policy, practice, custom and usage of denying his admission because of his race and would not have deprived and would not continue to deprive plaintiff, and other Negroes similarly situated, of his or their rights secured by the Constitution and laws of the United States, and hereinbefore and hereinafter more fully set forth." (Emphasis supplied.)

In paragraph 1 of the prayer of the amended complaint (R. 8), plaintiff prayed as follows:

"That this Court immediately convene a Three-Judge Court, as required by Title 28, United States Code, section 2284."

It is, therefore, clear that jurisdiction of the District Court was invoked in order to enjoin and restrict the action of officers of the State of Louisiana in the enforcement of statutes of that state and the execution of and the enforcement of an alleged order made by respondent, Board of Supervisors.

United States Code, Title 28, Section 2281, provides that where an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any *officer* of such state in the enforcement or execution of such *statute* or of an *order* made by any administrative board or commission acting under such state statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application is heard and determined by a district court of three judges. We quote Section 2281:

"§ 2281. Injunction against enforcement of State statute; three-judge court required

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

A reading of the amended complaint, particularly the above quoted paragraphs, shows that the issues fit exactly into the legal pattern outlined in Section 2281. This section was interpreted in *Stratton v. St. Louis Southwestern Railway Co.*, 282 U. S. 101, 75 L. Ed. 135, as follows:

"If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction. His authority is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty immediately to call two other judges, as the statute directs, to assist him in hearing and determining that application."

In the later case of *Query v. United States*, 316 U. S. 486, 489-90, 86 L. Ed. 1616, 1619, and 1620, this Court made it quite clear that cases of this kind can only be decided by the statutory three-judge court, saying:

> "If no more than a question of construction of a federal statute had been involved, there would have been no necessity for a three-judge court pursuant to § 266."
>
> ". . . But the complainants sought to restrain the state officers from enforcing the state statute upon the ground of the unconstitutionality of the threatened application. Not only was unconstitutionality the ground asserted by the complaints for the relief sought, but it appears that the relief awarded was predicated on the same ground. Cf. Wilentz v. Sovereign Camp, W. W. 306 U. S. 573, 576, 85 L. Ed. 994, 997, 59 S. Ct. 709."

Plaintiff here seeks to restrain state officers from enforcing state statutes on the ground that the threatened application of these statutes will deny plaintiff his rights under the Federal Constitution, and the relief awarded by the District Judge was predicated on this ground. Under such circumstances relief in the form of an injunction can be awarded only by a three-judge court.

This Court is presently considering the question of whether or not segregation in public education is illegal *per se* in four cases which were decided by statutory three-judge courts and appealed directly to the Supreme Court. Those cases are:

Briggs v. Elliott (S. C.), 98 F. S. 529, Dkt. 101.

Brown v. Board of Education (Kansas), 98 F. S. 797.

Bolling v. Sharpe (D. C.), 21 Law Week 3132, Dkt. 413.

Davis v. County School Board, 103 F. S. 337, Dkt. 191.

Those cases involve legal issues similar to those presented in the case at bar. If they had not been properly tried by a three-judge court this Court would not be entertaining these cases on direct appeal.

In those cases where a three-judge court has declined jurisdiction it will be noted that state officers were not involved as here.

In the petition for certiorari (R. 17), petitioner states that within the past three years the same question presented here was before the same district court, and in each case the Negro applicant was ordered admitted to Louisiana State University. He cites *Wilson v. Board of Supervisors*, 92 F. Supp. 986; *Foister v. Board of Supervisors*, No. 937 Civil Action, Eastern District of Louisiana; and *Payne v. Board of Supervisors*, No. 894 Civil Action, Eastern District of Louisiana. A three-judge court heard plaintiff's application in *Wilson v. Board of Supervisors*. The *Foister* and *Payne* cases were not heard by a three-judge court, even though the plaintiffs asked that one be convened under said Section 2281.

Defendants did not raise the jurisdictional question in either the *Foister* or *Payne* case. Moreover, the facts in the three cases were very dissimilar to the facts in the instant case. The *Wilson* case involved the application of a Negro to be admitted to the Law School of Louisiana State University. The main defense urged by defendants was that equal facilities were afforded at Southern University, which is a Negro university located, as is Louisiana State University, at Baton Rouge. On the facts presented there the District Court decided for the plaintiff, and its decision was affirmed by the Court of Appeals for the Fifth Circuit, and also by this Court, on motion of plaintiff. See per curiam opinion reported in *340 U. S.*

908, 910, 95 L. Ed. 657. The *Foister* case was filed by a Negro applicant for admission to the School of Medicine, Department of Nursing Education, of Louisiana State University, and the *Payne* case was filed by a Negro applicant for admission to the Graduate School of said University. As there is no other state-supported medical school or state-supported graduate school in the State of Louisiana, plaintiff in each case readily obtained a preliminary injunction, and those applicants were admitted. This complaint, however, was filed by a Negro applicant seeking admission to the freshman class of Louisiana State University with the expressed intention of seeking a Bachelor of Arts Degree and then a Bachelor of Laws Degree during a period of six years. Different from the *Wilson*, *Payne* and *Foister* cases, there are two other state-supported schools where plaintiff can obtain a B. A. Degree, which offer equal, or substantially equal, facilities according to defendants' contention.

Petitioner contends that where an applicant has properly made a claim of unconstitutionality sufficient to warrant a hearing and determination by a three-judge court, such claim may be abandoned and the matter properly litigated before a single district judge. (Petition, p. 17). This claim was urged in plaintiff's original complaint filed on August 21, 1953, as well as in his amended complaint filed on August 27, 1953. (The only substantial change in the amended complaint is that respondent Board of Supervisors in the original complaint was sought to be served through Tom W. Dutton, President, whereas in the amended complaint it was sought to be served through J. Stewart Slack, Chairman.) An order for hearing on plaintiff's application was signed by Honorable J. Skelly Wright on August 20, 1953, pursuant to plaintiff's original application. No subsequent order was issued. In his supple-

mental complaint filed August 27, 1953, plaintiff again demanded that the matter be tried by a three-judge court. The record is barren of any pleading indicating that he has ever abandoned his prayer for a three-judge court. Such contention of plaintiff is answered by Chief Judge Hutcheson as follows (R. 38-39):

> "It is true that plaintiff has it in his own hands to determine by the allegations of his complaint, in the first instance, whether a three judge court should be summoned, and, further, if, as originally drawn, his complaint presents a case for three judges, he may by amendment to or abandonment of his claim requiring the constitution of a three judge court, enable the district judge to proceed alone. This was many times taken advantage of, under the statute before it was amended to provide a three judge court in all cases where an injunction was sought, by the action of the plaintiff, if he desired one judge action, in dismissing his prayer for interlocutory injunction. Emphatically, however, the statute does not permit the district judge to pick and choose among the allegations of a complaint and, ignoring those which require the constitution of a three judge court, proceed with the case *as though those allegations had never been in, or had been dismissed from, the complaint.*"

As the sole question presented to this Court is the jurisdictional one (Petition, p. 2), we shall not presume upon the time of this Court to discuss the evidence as to whether or not the facilities are equal. We assume that this Court will not consider the merits of the case, even if it should decide that the District Judge alone had jurisdiction to hear and determine the cause, and that in such event the action will be remanded to the Court of Appeals to decide the other defenses, including the merits. However, if we are mistaken, and if Your Honors

should desire to consider the merits of the controversy, we urge that we be allowed additional time to brief the same.

CONCLUSION

For these reasons, and for the reasons stated in the majority opinion of the Court of Appeals for the Fifth Circuit, the plaintiff's petition for certiorari should be denied.

Respectfully submitted,

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